Federal Court  Cour fédérale

Date: 20210219

Docket: DES-5-19

Citation: 2021 FC 163

Ottawa, Ontario, February 19, 2021

PRESENT: The Honourable Mr. Justice O'Reilly

IN RE MOTION FOR RECONSIDERATION OF THE COURT'S ORDER IN *PESHDARY V AGC* (2018)

ORDER AND REASONS

I. Overview

[1] This disclosure request from Mr Peshdary arises in relation to an outstanding motion for reconsideration of an Order I issued in 2018 (*Peshdary v Canada (Attorney General)*, 2018 FC 911). In that decision, I ruled against Mr Peshdary's application to quash a warrant granted by the Federal Court to the Canadian Security Intelligence Service. The warrant, issued in 2012, had permitted the Service to gather intelligence relating to Mr Peshdary on the grounds that he posed a potential threat to the security of Canada. The Service turned over some of the information it had gathered about Mr Peshdary to the Royal Canadian Mounted Police. In turn, the RCMP used that information to obtain additional warrants under the *Criminal Code* to investigate Mr Peshdary for terrorism-related offences. The RCMP investigation resulted in two criminal charges against Mr Peshdary; his trial is ongoing before the Superior Court of Justice of Ontario.

[2] Mr Peshdary's application to quash the Service's warrant was based on the procedure recognized in *R v Wilson*, [1983] 2 SCR 594. *Wilson* confirmed that an issuing court can review the validity of a warrant (or, as in that case, a wire-tap authorization) and, on a showing of fraud, new evidence, material non-disclosure, or misleading disclosure, a judge could quash the warrant. On the merits of Mr Peshdary's application, I found that there were material omissions in the information provided to the issuing judge and that new evidence obtained after the warrant had been issued should have been presented to the judge pursuant to the Service's duty of candour. However, I also concluded that if the issuing judge had been made aware of those omissions and the new evidence, the judge would have granted the warrant in any case based on the other, uncontroverted evidence on which the Service had relied.

[3] In an earlier ruling in respect of Mr Peshdary, I had determined that the Federal Court had jurisdiction to respond to his application, based both on *Wilson* and the *Federal Courts Rules* (Rule 399) (*Peshdary v Canada (Attorney General)*, 2018 FC 850). I also found that Mr Peshdary was not entitled to additional disclosure of materials that were before the Court when it issued the warrant, beyond what he had already received. In my view, further disclosure was not justified in the context of a *Wilson* application (at paras 25-27).

II. The Present Proceeding

[4] An unusual confluence of events has resulted in Mr Peshdary's *Wilson* application coming back before me by way of a motion for reconsideration and this further request for disclosure.

[5] Mr Peshdary sought to appeal the rulings mentioned above to the Federal Court of Appeal. However, before the appeal was heard, the existence of new evidence was brought to my attention by counsel for the Attorney General of Canada. The evidence was also shared with the *amicus curiae,* Mr Ian Carter, who had been assisting me in ongoing *ex parte* matters related to Mr Peshdary, namely, applications by the AGC to protect sensitive national security information under the *Canada Evidence Act*, RSC 1985, c C-5.

[6] When new evidence arises in respect of a matter under appeal, the usual course is for the appellate court to consider that evidence as part of its review of the trial judge's decision (*Etienne v R*, [1993] FCJ No 1388 (Fed CA)). However, that approach is not mandatory; the trial judge retains jurisdiction to consider the new evidence in appropriate circumstances (*Musqueam Indian Band v Canada (Governor in Council)*, 2004 FC 931 at para 22). I reviewed the circumstances, including the Federal Court of Appeal's apparent preference that the new evidence be put before me, and concluded that I should reconsider my previous rulings in light of the new evidence.

[7] Normally, reconsideration of a ruling occurs only at the request of a party (Rule 399). The parties to the *Wilson* application were the AGC and Mr Peshdary. It would not have been reasonable to expect the AGC to seek reconsideration of rulings that had been made in its favour. On the other hand, it could not realistically have fallen to Mr Peshdary to move for reconsideration as he had not received disclosure of the new evidence. In the circumstances, I concluded that the reconsideration should proceed on my own motion (*Carter v Canada (Attorney General)*, 2020 FC 137). In arriving at that conclusion, it was always contemplated,

and discussed with counsel for the AGC and the *amicus*, that the timing and form of Mr Peshdary's involvement in the reconsideration motion had to be resolved.

[8] The next issue I considered was the extent to which the new evidence had to be disclosed to the Court and to the *amicus*. In an Order dated July 17, 2020, I found that I had jurisdiction to order further disclosure of materials relevant to the issuance of the warrant if there had been a failure to provide the Court with full and frank disclosure of information on a material issue (relying on *Minister of National Revenue v RBC Insurance Co*, 2013 FCA 50 at para 33). In my Order, I summarized the areas of concern, noting some of the differences between the evidence placed before the issuing judge in 2012 and that which had formed the basis of earlier related warrant applications. It appeared to me that some of the information put before the issuing judge was incomplete and potentially misleading. Accordingly, I ordered disclosure to Mr Carter of the documents he had identified as clearly relevant to the validity of the 2012 warrant, with the understanding that his review of those documents could potentially justify additional disclosures.

[9] In addition, I noted in my ruling that the treatment and significance of any unlawfully-obtained evidence would also be relevant to the reconsideration of my ruling on Mr Peshdary's *Wilson* application.

[10] Within this context, I must now address Mr Peshdary's request for full disclosure of the new evidence that has given rise to this motion for reconsideration of my ruling on his *Wilson* application.

[11] The AGC opposes Mr Peshdary's request, arguing that no disclosure is required by the rules that apply to criminal proceedings because Mr Peshdary is not an accused person in this Court. Further, says the AGC, no disclosure is mandated by the *Canadian Charter of Rights and Freedoms*. Finally, the AGC points out that Mr Peshdary cannot receive disclosure of information that merits national security protection.

[12] I disagree with the AGC, although I concede that the rules of disclosure in criminal law and required by the Charter are not in issue here.

[13] As explained above, this proceeding began as, and continues to be, an application by Mr Peshdary to quash a warrant issued by this Court. In the initial round, Mr Peshdary sought disclosure of various materials, including source documents underlying the issuance of the warrant he was challenging. There was no basis at that point for any further disclosure and there were no grounds for quashing the warrant.

[14] However, as explained above, a warrant can be quashed where there is evidence of fraud, new evidence, material omissions, or misleading disclosures to the issuing judge.

[15] Here, in granting disclosure to the *amicus*, I have already concluded that the 2012 warrant application may have included material omissions, misleading disclosures, and evidence that may have been obtained illegally. Had Mr Peshdary been able to present evidence along these lines in his original *Wilson* application, the result of his motion to quash the warrant might well have been different. But this evidence has now come to the Court's attention, commendably I

must add, from the AGC. The question is whether Mr Peshdary, the applicant in the motion under reconsideration, can have access to it. I can see no reason to deny him.

[16] In my view, the only justification for shielding the new evidence from Mr Peshdary would be to protect sensitive national security information. However, the AGC has not put forward any justification for that protection. It asserts that the information it brought to the attention of the Court and the *amicus* should be protected, but that mere assertion is not enough to justify non-disclosure to Mr Peshdary. The proper means for claiming a national security basis for non-disclosure is an application by the AGC under s 38.04(1) of the *Canada Evidence Act*. That route would permit the Court to ascertain whether the AGC's national security concerns are well-founded.

[17] Accordingly, I find that Mr Peshdary, as a party to the motion that is under consideration, is entitled to receive disclosure of the new evidence on which this reconsideration is based. In particular, Mr Peshdary should receive disclosure of the evidence I previously ordered to be disclosed to the *amicus*.

III. Conclusion and Disposition

[18] Mr Peshdary's request for disclosure of the evidence supporting the motion for reconsideration of his *Wilson* application is granted.

ORDER IN DES-5-19

THIS COURT ORDERS that Mr Peshdary's request for disclosure of the evidence supporting the motion for reconsideration of his Wilson application is granted.

"James W. O'Reilly"
Judge

ANNEX

***Federal Courts Rules* (SOR/98-106)**	***Règles des Cours fédérales* (DORS/98-106)**
99(1)On motion, the Court may set aside or vary an order that was made	399(1)La Cour peut, sur requête, annuler ou modifier l'une des ordonnances suivantes, si la partie contre laquelle elle a été rendue présente une preuve *prima facie* démontrant pourquoi elle n'aurait pas dû être rendue:
a)*ex parte*; or	a)toute ordonnance rendue sur requête *ex parte*;
(b)in the absence of a party who failed to appear by accident or mistake or by reason of insufficient notice of the proceeding, if the party against whom the order is made	b)toute ordonnance rendue en l'absence d'une partie qui n'a pas comparu par suite d'un événement fortuit ou d'une erreur ou à cause d'un avis

discloses a *prima facie* case why the order should not have been made.	insuffisant de l'instance.
…	…
Canada Evidence Act (RSC 1985, c C-5)	Loi sur la preuve au Canada (LRC (1985), ch C-5)
38.04(1)The Attorney General of Canada may, at any time and in any circumstances, apply to the Federal Court for an order with respect to the disclosure of information about which notice was given under any of subsections 38.01(1) to (4).…	38.04(1)Le procureur général du Canada peut, à tout moment et en toutes circonstances, demander à la Cour fédérale de rendre une ordonnance portant sur la divulgation de renseignements à l'égard desquels il a reçu un avis au titre de l'un des paragraphes 38.01(1) à (4).…

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	DES-5-19
STYLE OF CAUSE:	IN RE MOTION FOR RECONSIDERATION OF THE COURT'S ORDER IN *PESHDARY V AGC* (2018)
PLACE OF HEARING:	HEARING HELD BY TELECONFERENCE IN OTTAWA, ONTARIO
DATE OF HEARING:	FEBRUARY 8, 2021
ORDER AND REASONS:	O'REILLY J.
DATED:	FEBRUARY 19, 2021

APPEARANCES:

Mr. Solomon Friedman Mr. Fady Mansour	FOR MR. PESHDARY
Mr. Ian Carter	*AMICUS CURIAE*
Mr. Andre Seguin Mr. Julian Daller	FOR THE ATTORNEY GENERAL OF CANADA

SOLICITORS OF RECORD:

Friedman Mansour LLP Ottawa, Ontario	FOR MR. PESHDARY
Bayne, Sellar, Ertel, Carter Barristers & Solicitors Ottawa, Ontario	FOR THE DEFENDANT
Department of Justice Canada Ottawa, Ontario	FOR THE ATTORNEY GENERAL OF CANADA